IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1785

**CALVIN EUGENE FLOWERS, JOHN C. GREICHUNOS, and ROBERT D. HARDIN,**

*Petitioners,*

VS.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners Calvin Eugene Flowers, John C. Greichunos, and Robert D. Hardin pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming their convictions in the United States District Court for the Northern District of Indiana, South Bend Division, for violation of 18 U.S.C. Sec. 659, theft from interstate shipment.

## REFERENCE TO REPORTS OF OPINIONS

United States v. Calvin Eugene Flowers, John C. Greichunos, and Robert Douglas Hardin, Gen. No. 76-1259, 76-1260, 76-1261, unpublished Order per Circuit Rule 35 dated February 24, 1977 is attached as Appendix "A".

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 24, 1977 affirming the conviction, Senior District Judge William J. Campbell of the Northern District of Illinois, sitting by designation, dissented. A timely petition for rehearing and suggestion for rehearing *en banc* was filed and denied on May 16, 1977. Judge Luther M. Swygert voted to grant a rehearing *en banc*. The Order of May 16th and Judge Swygert's statement is attached as Appendix "B".



## QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment prohibits the roving patrol stop and detention of a vehicle and its occupants based on suspicion growing out of general information of thefts in the area?

## CONSTITUTIONAL PROVISIONS PRESENTED

The Fourth Amendment to the Constitution of the United States.

## STATUTES INVOLVED

18 U.S.C., Sec. 659.

## RULE

Rule 41—Federal Rules of Criminal Procedure.

## STATEMENT OF THE CASE

### Motion To Suppress Evidence

At 11:30 p.m. (E.S.T.) on January 23, 1975, Indiana State Trooper Richard Stalbrink stopped a pickup truck being driven by defendant Flowers and travelling north on U.S. Highway 421 about four and one-half miles north of LaCrosse, Indiana. Hardin and Greichunos were passengers in the truck which was fully loaded with cartons of air conditioners stacked above the sides and tailgate of the truck. U.S. Highway 421 is a truck route. Stalbrink stopped the pickup truck because he had general information regarding the theft of television sets from railroad cars in the area of Wilders, Indiana, a community four miles south of LaCrosse, during a three month period prior to the stopping and that a pickup truck had been seen in the area either before or after the thefts. The officer did not have knowledge of any specific crime having been committed, and the reason for stopping the vehicle was because it looked suspicious. He further testified, "that a pickup truck with boxes is not particularly suspicious; however, since we had several thefts of color t.v. sets, when I first saw this truck at that time of the night—no other traffic around—at my first glance I thought these might be t.v. sets, and they looked like brand new cartons."

Stalbrink asked the driver for his driver's license and vehicle registration. The driver produced the latter but told Stalbrink he did not have his license with him. The driver accompanied the Trooper to the squad, and a radio check was made on his driver's license. While they were waiting for the report on the driver's license, Flowers told Stalbrink that the cartons in the truck contained air conditioners that he had bought for $125 each



from a Medaryville, Indiana truck driver named John Simpson and indicated the general location of Simpson's pole barn where he purchased them. The driver told Stalbrink that he and his companions were taking the air conditioners to Lake County, Indiana, for resale.

After the license check showed that the driver had a valid license, Stalbrink asked the other two occupants of the pickup truck to join him and the driver in the squad car where each gave similar identifying information. Following a brief conversation, the Trooper got out of his car, went to the back of the truck and took serial and model numbers from the cartons, and radioed this information to the National Crime Information Center to determine whether any of the property had been recently reported stolen. A few minutes later, the Trooper was notified that the serial numbers and model numbers of the items submitted had not been reported stolen. The truck and its occupants were permitted to leave. In all, fifteen to twenty minutes had elapsed from the time of the stopping of the pickup truck and the departure of the defendants. The pickup truck was an open bed vehicle, the cartons were not covered, and were clearly identified as air conditioners on the exterior of the cartons.

The Government concedes that the search was made without a warrant and was not incidental to an arrest. The information obtained from the truck and the occupants by Stalbrink was turned over to detectives of the Indiana State Police who commenced an investigation as to the possible theft of air conditioners from interstate shipment. On January 31st, a quantity of air conditioners was reported missing from a shipment contained in a C & O boxcar at Clearfield, Utah. Subsequent investigation revealed that this car had been in the LaCrosse, Indiana, yard of the C & O Railroad on January 23, 1975. Based upon the information obtained

from Officer Stalbrink, the petitioners herein were arrested in June and charged with the theft from interstate shipment. The trial court denied the Motion to Suppress Evidence, and following a trial by jury, petitioners were convicted and petitioner Calvin Flowers was sentenced to a term of three years, pursuant to 18 U.S.C. 4208(a)(2), Robert D. Hardin to a term of two years, pursuant to 18 U.S.C. 4208(a)(2), and John G. Greichunos to a term of one year. The United States Court of Appeals for the Seventh Circuit affirmed, one judge dissenting.

## REASONS FOR GRANTING THE WRIT

**THIS CASE PRESENTS AN IMPORTANT QUESTION RELATING TO THE VALIDITY OF INVESTIGATORY STOPS AND ARRESTS, AND THE CONSTITUTIONAL LIMITATIONS ON THE DOCTRINE OF FOUNDED SUSPICION WHERE THERE IS NO QUANTUM OF INDIVIDUALIZED SUSPICION TO WARRANT THE INITIAL INTRUSION AND SUBSEQUENT DETENTION, AND IS IN CONFLICT WITH PRIOR HOLDINGS OF THIS COURT.**

Despite the fact that the government conceded that the search was made without a warrant and not incidental to an arrest, and the majority of the Court below did not contend that the officer had probable cause to stop and detain the vehicle and its occupants, the majority of the panel nevertheless concluded that reasonable suspicion existed, "to stop this particular truck, loaded with similar cartons, at 11:30 p.m. and interrogate the driver and passengers," citing *Terry v. Ohio*, 392 U.S. 1, *Adams v. Williams*, 407 U.S. 143, and *United States v. Martinez-Fuerte*, 44 LW 5336, 5341.



The factual circumstances which support the holding in *Terry*, reveal a chronicle of individualized suspicious activity being observed by a police officer with thirty-five years of experience who saw two of the three suspects in that case walk back and forth in front of a store in broad daylight no less than twelve times, peer into the store a total of twenty-four times and then return to the corner and have what appeared to be a conversation and were then joined by a third man. The individualized suspicious activity of the defendants in *Terry* was observed by the officer for a period of 10 or 12 minutes prior to the confrontation a short distance away.

As pointed out by the dissent in the instant case, "Whatever *Terry* and *Adams* hold with respect to the right of a police officer to approach a person for purposes of investigating possible criminal behavior and to conduct a limited *protective search* for concealed weapons, those cases have no applicability to the facts in this case." This Court in *Terry* emphatically rejected the notion that investigatory stops and their attendant frisks are outside the purview of the Fourth Amendment because they fail to rise to the level of search and seizure within the meaning of our Constitution. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." *Henry v. United States*, 361 U.S. 98 (1959); *[illegible] v. Mississippi*, 394 U.S. 721 (1969).

The Court in *Terry* warned of the danger implicit in the logic which proceeds upon the distinctions between investigatory stops and arrests, or seizure of the person and a frisk, by pointing out that it seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. It went on to conclude that the sounder course is to recognize that the

Fourth Amendment governs all intrusions by agents of the public upon personal security and to make the scope of the particular intrusion, in light of all of the exigencies of the case, a central element in the analysis of reasonableness. *Terry* fn. 15, p. 1878 Cf. *Brinegar v. United States*, 338 U.S. 160, 183, 69 Sup. Ct. 1302, 1314, 93 L. Ed. 879 (1949), and other cases cited therein. As this Court pointed out, "In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. *Beck v. Ohio*, 379 U.S. 89 (1964). Cf. fn. 18 *Terry, supra*, p. 1880.

Officer Stalbrink of the Indiana State Police was on a routine traffic patrol and was not investigating any crime, he was travelling in a northerly direction and observed a pickup truck driving along a truck route carrying cartons headed in the same direction. The only specific and articulable fact which he possessed was general information that there had been several thefts of television sets from interstate shipment involving the use of a pickup truck over a period of three months prior to the date in which he stopped the appellants a distance of 8½ miles away. The officer freely conceded that he did not have any knowledge of any specific crime and the sole reason for stopping the vehicle was because it looked suspicious. There was absolutely nothing that the police officer could point to, based either upon his general knowledge of criminal activity, or the conduct of this particular vehicle, from which he could rationally infer individualized suspicion to stop this particular vehicle. As stated in *United States v.*



*Carrioza-Gaxiola*, 523 F. 2d 239 (9th Cir. 1975), "Founded suspicion requires some reasonable ground for singling out the person stopped—driving a Ford LTD is not suspicious, nor is driving it toward Nogales." 523 F. 2d at 241.

It is difficult to conceive how conduct which was not even unusual can be raised to the level of suspicion, let alone reasonable suspicion. Officer Stalbrink testified that there was nothing unusual about a pickup truck loaded with cartons travelling on this highway, yet the court concluded that this fact, coupled with the general knowledge of thefts in the area, was sufficient to constitute reasonable suspicion to stop this particular truck. It therefore must follow that the majority holding would condone the police officer stopping any panel truck carrying cartons which was within that general area.

The decision's reliance upon *Adams v. Williams* is equally misplaced. In that case the officer was on patrol duty in a high crime area of Bridgeport, Connecticut. At approximately 2:15 a.m. an informant, known to the officer and who had previously provided him with information in the past, approached his vehicle and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. In upholding the officer's forcible stop of Williams, the court stated that while the unverified tip from the informant may have been insufficient for a narcotics arrest or a search warrant, see e.g. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964), "the information carried enough indicia of reliability to justify the officer's forcible stop of Williams for the purpose of conducting a weapons search limited in scope to his protective purposes." Citing *Terry v. Ohio*. In interpreting the *Terry* decision, the court in *Adams v. Williams* stated, "The purpose of this limited search is

not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable."

*Martinez-Fuerte*, relied upon by the Court below, is similarly inapplicable to the facts in the instant case. This Court upheld a routine stopping of a vehicle at a permanent check point located on a major highway, away from the Mexican border, for brief questioning of the vehicle's occupants, and further held such procedure to be consistent with the Fourth Amendment in the absence of any individualized suspicion that the particular vehicle contains illegal aliens. But the court expressly limited its holding to stops for brief questioning, routinely conducted at permanent check points, and expressly excluded roving patrol stops and check point searches, and further held that any further detention must be based upon consent or probable cause. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

The second reason why the Motion to Suppress should have been granted is that even if the stop were based upon reasonable suspicion, it was based on the officer's suspicion that the truck may have contained stolen television sets. The cartons, uncovered and on an open bed pickup truck, were clearly marked air conditioners. The petitioners told the officer that the boxes contained air conditioners. Therefore, when the officer exited the squad car for the purpose of copying down the serial numbers of the boxes, it could only be on suspicion that the air conditioners were stolen. He had absolutely no reason or suspicion to suspect that the air conditioners were stolen. The theft of the air conditioners was not discovered until a week later. Whatever quantum of reasonable suspicion he may have had prior to the stopping was immediately dissipated by the fact that it was



obvious that this truck was not loaded with television sets. As Judge Swygert pointed out in his statement in support of a rehearing *en banc*, "His investigation of the air conditioners thus constituted a 'fishing expedition' which is forbidden by the Fourth Amendment." A proper observance of our constitutional safeguards far outweighs the fortuitous results of an illegal arrest and the subsequent attendant search.

## CONCLUSION

From the above and foregoing premise, petitioners pray that your Honors will consider their complaints to be of sufficient constitutional magnitude to warrant this Court's review on writ of certiorari.

Respectfully submitted,

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# APPENDIX A

## UNITED STATES COURT OF APPEALS

**For the Seventh Circuit**
**Chicago, Illinois 60604**

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Nos. 76-1259 to 76-1261

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

CALVIN EUGENE FLOWERS, JOHN C. GREICHUNOS, ROBERT D. HARDIN,

*Defendants-Appellants.*

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Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S CR 75-44—**Robert A. Grant**, *Judge.*

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HEARD NOVEMBER 2, 1976—DECIDED FEBRUARY 24, 1977

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Before CUMMINGS and BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

## ORDER

In June 1975, the three defendants were indicted for their January 23, 1975, Indiana theft of 23 Whirlpool air conditioners being shipped interstate aboard the Chesapeake & Ohio Railroad, in violation of 18 U.S.C. § 659. Their motion to suppress evidence was denied on August 7, 1975, and a mistrial was declared during the jury selection because the jury did not represent a random draw of prospective jurors since half of them had sat as jurors the previous week. After a two-day trial commencing on December 2, 1975, a jury found them guilty, and Flowers received a 3-year sentence, Hardin a two-year sentence, and Greichunos a one-year sentence. All three appealed. We affirm.

*Denial of Motion to Suppress*

At 11:30 p.m. (EST) on January 23, 1975, Indiana State Trooper Richard Stalbrink stopped a pickup truck being driven by defendant Flowers and traveling north on U.S. Highway 421 about four and one-half miles north of LaCrosse, Indiana. Hardin and Greichunos were passengers in the truck which was fully loaded with cartons of air conditioners stacked above the sides and tailgate of the truck. No other traffic was present.

Stalbrink stopped the pickup truck because he was investigating a number of night-time television thefts from a railroad yard in Wilders, Indiana, four miles south of LaCrosse, and transported from that area in pickup trucks. Flowers' truck was only eight and a half miles from Wilders, and the cartons in his truck resembled cartons for television sets.



Stalbrink asked Flowers for his driver's license and vehicle registration. Flowers produced the latter but told Stalbrink he did not have his license with him. Flowers then accompanied the Trooper to his squad car, and a radio check was made of his driver's license. While they were waiting for the report on the driver's license, Flowers told Stalbrink that the cartons in the truck contained air conditioners that he had bought for $125 each from a Medaryville, Indiana, truck driver named John Simpson and indicated in vague terms the location of Simpson's pole barn in Medaryville. Flowers said he and his companions were taking the air conditioners to Lake County, Indiana, for resale.

After the license check showed that Flowers had a valid license, Stalbrink asked the other two defendants to join him and Flowers in the squad car where each gave similar indentifying information. As they were talking in the squad car, Stalbrink asked Flowers if it would be all right if he copied the numbers from one of the cartons in the truck, and Flowers agreed. The Trooper then recorded a serial and model number from one of the cartons. His radio check advised that no theft had been reported of such a carton, and defendants then went on their way. In all, 15 to 20 minutes elapsed from the time of the stopping of the pickup truck and the departure of the defendants.

The Government concedes that the search was made without a warrant and was not incidental to an arrest. Because Stalbrink had been investigating thefts of color TV sets carried away from a nearby railroad yard in pickup trucks, he had reasonable suspicion to stop this particular truck, loaded with similar cartons, at 11:30 p.m. and interrogate the driver and passengers in accord with *Terry v. Ohio*, 392 U.S. 1, and *Adams v. Williams*,

407 U.S. 143.[1] Cf. *United States v. Martinez-Fuerte*, 44 LW 5336, 5341. During the investigatory stop, which lasted only while the defendants' driver's licenses and vehicle registrations were being checked, Flowers consented in the presence of the other defendants to the Trooper's checking the serial and model number on one of the cartons. Before Flowers' consent was given, it was unnecessary to give the warnings prescribed in *Miranda v. Arizona*, 384 U.S. 436, for no truly custodial interrogation of defendants was being undertaken. *Oregon v. Mathiason*, ..... U.S. ....., 45 LW 3505; *Beckwith v. United States*, 425 U.S. 341. Indeed defendants were left alone in the squad car with its motor running while the Trooper obtained the numbers on one of the cartons. Defendants must have been aware of the purpose of Stalbrink's check of the boxes since he told them in the car that the reason for his original suspicion was the recent television thefts. Since no threat or coercion was used by Stalbrink to obtain Flowers' consent to this minimal intrusion, the Fourth Amendment was not violated. *United States v. Watson*, 423 U.S. 411; *United States v. Matlock*, 415 U.S. 164; *Schneckloth v. Bustamonte*, 412 U.S. 218. There is no need to consider the alternative plain view argument of the Government, but it may be noted that there could have been no genuine expectation of privacy here, for the air-conditioner cartons were clearly visible to anyone driving behind the pickup truck. *South Dakota v. Opperman*, 44 LW 5294, 5295-5296. The motion to suppress was properly denied.

*Sufficiency of the Evidence*

Defendants also argue that the evidence was insufficient to support the jury's guilty verdict. We cannot agree.

[1] Because this was a reasonable investigatory step, we need not determine whether, as in *United States* ex rel. *Burbank v. Warden*, 535 F.2d 361 (7th Cir. 1976), probable cause was shown.



When Trooper Stalbrink stopped defendants' pickup truck about 11:30 p.m. (EST) it was only four and one-half miles from LaCrosse, Indiana. The boxcar from which the Whirlpool air conditioners were taken was in an unmanned railroad yard (two blocks from U.S. Highway 421) at LaCrosse from 8:00 p.m. to 10:48 p.m. (EST) that evening. The 23 air conditioners could be unloaded by 3 men in 5-6 minutes without special tools. Moreover, Hardin had an extensive knowledge of boxcars. The numbers which Stalbrink wrote down from the air conditioner carton on the back of defendants' truck were identical to those on one of the missing cartons. The explanation that defendants gave for having a truckload of stolen air conditioners in their possession was that they had bought them that evening—untested, boxed, and off the back of a truck—from a "John Simpson" and resold them to him after being stopped by Stalbrink. Simpson was never found nor could he be located where Flowers said he lived. Obviously the jury considered Simpson to be a fictitious person and refused to credit the alibi. Even accepting the time reference given by defense witnesses, it was perfectly possible for them to have removed the air conditioners from the Chesapeake & Ohio boxcar and yet arrive where Stalbrink stopped them at 11:30 p.m. (EST). There was ample evidence for the jury to conclude that defendants had either stolen the air conditioners or had aided and abetted in their theft, making them culpable as principals under 18 U.S.C. § 2.

*Denial of Defendants' Motion for Mistrial*

Defendants introduced the radio log record of the Indiana State Police during their direct examination of Stalbrink. To corroborate his testimony that the stopping

occurred at 11:30 p.m. Eastern Standard Time (or 10:30 LaCrosse time), the prosecutor asked Stalbrink during cross-examination to testify about other information on the radio log of the Indiana State Police. The last item that Stalbrink read from the radio log (Defendants' Exhibit G) was as follows:

> "Subject is single, 33, which is a state police code for known burglar" (Tr. 186).

Defense counsel immediately objected and moved for a mistrial, and the court thereupon struck the answer and told the jury to disregard the comment and give it no weight whatever and to erase it from their minds. The comment was never mentioned thereafter during the trial. However, during his direct examination by his counsel, Flowers later admitted that he previously had been convicted in 1972 in federal court of possession of a stolen automobile.[2] Therefore, any prejudice that might have resulted to Flowers from Stalbrink's translation of the Indiana Police code was vitiated by his own testimony. A mistrial was not warranted.

*Earlier Grant of Government's Motion for Mistrial*

After interrogating some prospective jurors during the August 7 voir dire, the court asked counsel for the parties to approach the bench. After fifteen peremptory challenges had been exercised, it became apparent that at least six of those in the jury box had been jurors in a criminal trial the week before, so that there was a failure to call a randomly selected jury panel. This prompted the court to grant a mistrial upon the Government's oral motion.

[2] If Flowers had not so testified on direct, it would have come out on cross-examination by the Government. See Rule 609, Federal Rules of Evidence.



Defendants first assert that the mistrial was improper because the Government had not filed a written motion containing a sworn statement of facts showing a substantial failure to comply with the provisions of the Jury Selection and Service Act of 1968, as required by 28 U.S.C. § 1867(d) and (e). No such objection was raised in the court below and therefore need not be considered. In any event, the mistrial motion was inspired by the district judge, and he was of course not subject to those requirements. The transcript of his remarks shows that Judge Grant was motivated solely by the lack of a random draw of the jury. His decision to have the Government request a mistrial and then to grant it was within his inherent power. Rather than arbitrarily denying future jury service to veniremen who had previously served at the same term on another jury, the court was ensuring compliance with the random selection requirements of the statute. See 28 U.S.C. §§ 1861, 1863, 1864 and 1866.

Defendants also assert that the sidebar preceding the mistrial declaration should have been transcribed pursuant to 28 U.S.C. § 753(b) which mandates the recording of "all proceedings in criminal cases had in open court." First of all, no objection was made at the time and therefore comes too late. Rule 51, Federal Rules of Criminal Procedure. Moreover, there is no showing that the court reporter was subsequently requested to transcribe any notes of the sidebar. If there was error, it was harmless within Rule 52(a) because defendants have not shown that their rights were affected by the failure to transcribe the sidebar. Indeed, the mistrial was to defendants' advantage because their counsel had previously stated that he had not had adequate time to prepare for the August 7 trial.

Defendants next contend that the convictions violated the double jeopardy clause of the Fifth Amendment because of the declaration of a mistrial. However, jeopardy did not attach to prevent the December 2 trial because the first jury was not sworn nor even completely selected at the time of mistrial. Therefore, *Downum v. United States*, 372 U.S. 734, upon which defendants rely, is inapplicable.

The judgments of conviction are affirmed.

CAMPBELL, *dissenting.* I have serious reservations regarding the trial court's refusal to grant defendant's motion for a mistrial. Notwithstanding the trial court's instructions, I think it is pure fiction to assume the jury could give "no weight whatever and . . . erase from their minds" officer Stalbrink's testimony that Flowers was a "known burglar." I have even stronger reservations about granting the government's motion for a mistrial after fifteen peremptory challenges had been exercised, when "it became apparent that at least six of those in the jury box had been jurors in a criminal trial the week before . . .". The reason the government had exhausted all of its peremptory challenges was that a number of prospective jurors had returned a verdict of not guilty in the previous criminal trial. Regardless of whether jeopardy had attached, the court's ruling, in effect, allowed these former jurors to be removed "for cause" and granted the government a fresh set of peremptory challenges.[1]

[1] With respect to the efficient use of juries selected for service in the district courts, the trial court's granting the government's motion for a mistrial did little to promote the effective and financially expeditious use of juries as advocated by the appropriate committees of the Judicial Conference of the United States and the Federal Judicial Center.



However, I see no reason to resolve either of these issues, nor to determine whether reversal would be appropriate if resolved in appellants' favor. Rather I would reverse on the ground that evidence obtained by officer Stalbrink subsequent to stopping and detaining defendants should have been suppressed. Review of the record shows clearly that there existed no probable cause to arrest defendants at the time they were stopped and detained; the majority does not hold otherwise. The government concedes that the search was made without warrant and that it was not made incident to a lawful arrest. Stalbrink testified that defendants were not free to leave.[2] I fail to see any justification for declining to grant the motion to suppress.

The record reveals that defendants were travelling on U.S. Highway 421 at approximately 11:30 P.M. in a pickup truck loaded with cartons. Highway 421 is frequently used by truck traffic, and, as Trooper Stalbrink testified, there was nothing unusual about a pickup truck loaded with cartons travelling on this highway. Suspecting that the truck may have been loaded with stolen color T.V. sets, Stalbrink stopped the truck and detained the defendants for a period of time, the duration of which is variously asserted to have been from 15 to 25 minutes. During the detention, the trooper ordered defendants to sit in the back seat of the patrol car while he checked identifications and conducted an interrogation. Stalbrink himself testified that during this period of time the defendants were not free to leave.

[2] Thus, the majority's reliance upon *Oregon v. Mathiason*, U.S. 45 U.S. L. W. 3505 and *Beckwith v. United States*, 425 U.S. 341, to the extent that they may be pertinent to the issues in the instant appeal, is entirely misplaced.

During the course of the interrogation, Stalbrink advised the defendants of recent thefts of T.V.s from a nearby railroad yard, and his original suspicion of the pickup truck loaded with cartons. Although the truck obviously was not loaded with T.V. sets, Stalbrink then stated: "Do you mind, I am going to take a look at the serial numbers." Defendant Flowers allegedly consented.

The majority holds that Stalbrink had a reasonable suspicion to stop the pickup truck and interrogate the defendants in accord with *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Illinois*, 407 U.S. 143 (1972). Whatever *Terry* and *Adams* hold with respect to the right of a police officer to approach a person for purposes of investigating possible criminal behavior and to conduct a limited *protective* search for concealed weapons, those cases have no applicability to the facts in this case.

It is clear that once a suspect is taken into custody, or is otherwise deprived of his freedom of action, he is under arrest. *Henry v. United States*, 361 U.S. 98 (1959); *Davis v. Mississippi*, 394 U.S. 721 (1969). It is equally clear that an arrest must be based upon probable cause, *United States v. Watson*, 423 U.S. 411 (1976); *Spinelli v. United States*, 393 U.S. 410 (1969); *Sibron v. New York*, 392 U.S. 40 (1968); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949). In the instant case, defendants were overtaken and apprehended by Trooper Stalbrink, ordered to remove themselves from the pickup truck to the back seat of the patrol car, were compelled to produce identification and undergo interrogation. That their freedom of action was significantly interfered with is demonstrated by Stalbrink's own testimony that defendants were not free to leave during the stop.



On the basis of the foregoing facts, I am compelled to find that the defendants were arrested. I am further compelled to find that there was no probable cause upon which defendants' arrest can be based. At best, Stalbrink possessed, as the majority recognizes, reasonable suspicion to detain defendants. Such reasonable suspicion was an insufficient basis upon which to arrest defendants.

Since the illegal arrest resulted in evidence and statements later introduced at trial, and since the record is far from clear that Flowers voluntarily consented to the search which led to the evidence, I think that the motion to suppress should have been granted. I would reverse the convictions.

# APPENDIX B

## UNITED STATES COURT OF APPEALS

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Nos. 76-1259, 76-1260, & 76-1261
UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

CALVIN EUGENE FLOWERS, et al.,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S CR 75-44—**Robert A. Grant**, *Judge.*

HEARD MAY 16, 1977

Before CUMMINGS, and BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge**.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.



ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellants, Flowers, Greichunos and Hardin, a vote of the active member of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Swygert voted to grant a rehearing *en banc*, and his statement is attached hereto.

Statement of Circuit Judge Swygert accompanying his vote for a rehearing *en banc*.

My vote for a rehearing en banc is based primarily on Judge Campbell's dissent. In my opinion, there were two reasons why the district court should have suppressed the evidence in this case. First, there was no probable cause for Indiana State Policeman Stalbrink to stop the truck driven by the defendant Flowers and in which the other two defendants were riding. Stalbrink testified that he stopped the pickup truck solely because there had been previous thefts of television sets in the area and the truck was loaded with cardboard boxes that resembled television sets. Specifically, he testified as follows:

> Q And so, what is suspicious about a pickup truck with boxes on it?
>
> A Any pickup truck with any boxes is not particularly suspicious; however, since at that time we had several thefts of color TV sets, when I first saw this truck at that time of the night—no other traffic around—at my first glance I thought these might be TV sets. They looked like brand new cartons.

Admittedly, the only reason for stopping the truck was a suspicion on the part of the police officer. This is not enough to justify a stop. *Brinegar v. United States*, 338 U.S. 160, 177. "[E]very traveler along the public highways may [not] be stopped and searched at the officers' whim, caprice or mere suspicion." The majority's reliance on *Terry v. Ohio*, 293 U.S. 1; and *Adams v. Williams*, 407 U.S. 143, to justify the stop is misplaced: those cases stand merely for the proposition that a police officer may stop and frisk a person suspected of carrying a weapon. The rationale behind those cases was to permit the police officer to protect himself. That rationale is inapplicable here.

The second reason why the motion to suppress should have been granted is that even if the stop were legitimate, it was based on the officer's belief that the truck may have contained stolen television sets. However, Stalbrink was told by the defendants that the boxes contained air conditioners and he took down the serial numbers on those boxes on the suspicion that the air conditioners were stolen. He had absolutely no reason at that time to suspect that the air conditioners were in fact stolen. His investigation of the air conditioners thus constituted a "fishing expedition" which is forbidden by the Fourth Amendment.

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